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CHARLES E. GADLEY

IN THE
Supreme Court of the United States

No. **431**.

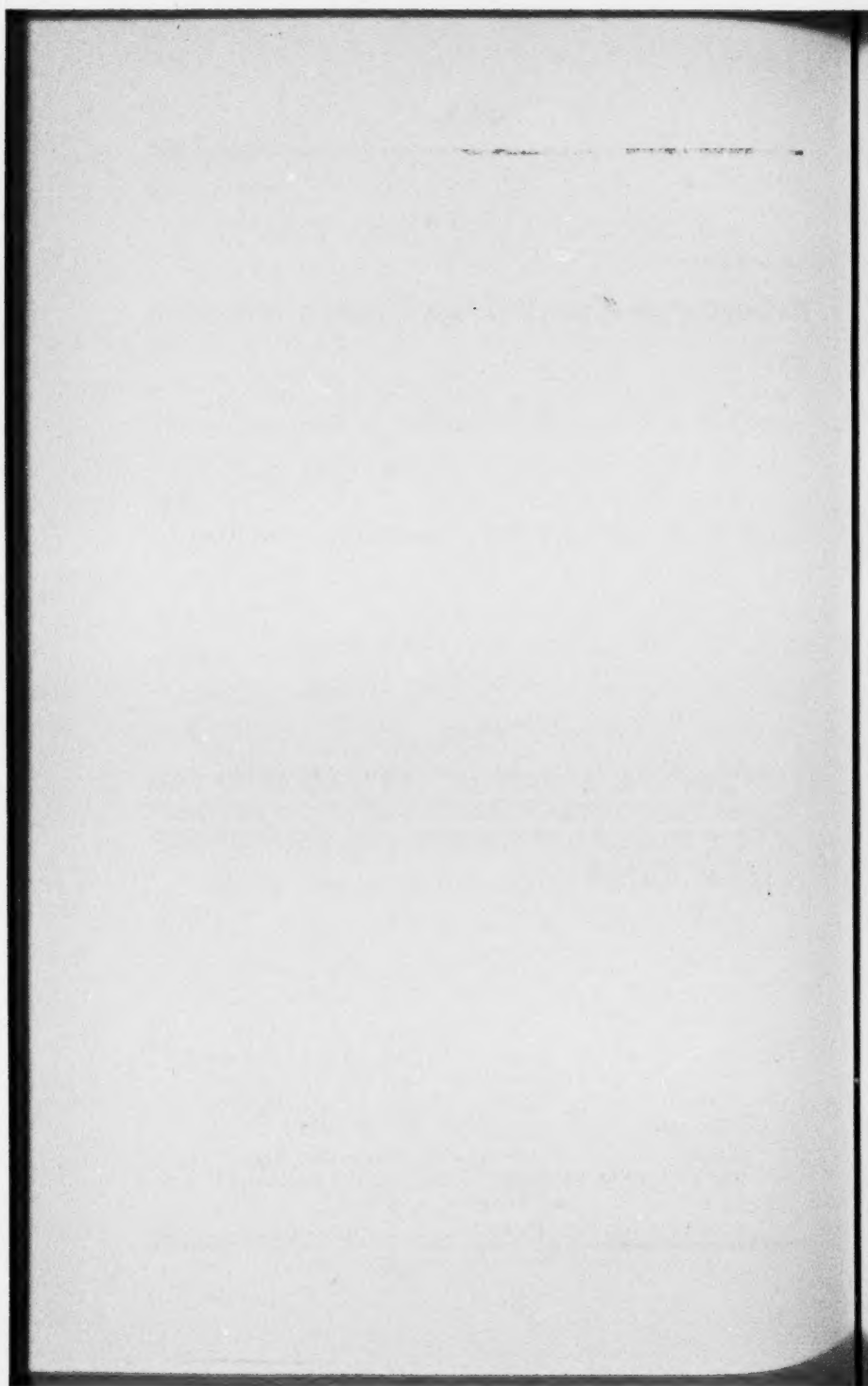
H. T. POINDEXTER & SONS MERCHANDISE COMPANY,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUP-
PORT THEREOF.**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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PORT THEREOF.**

H. T. Poindexter & Sons Merchandise Company, a Missouri corporation, prays that a writ of certiorari issue to bring before this Court for review a Judgment rendered by the United States Circuit Court of Appeals for the Eighth Circuit reversing a judgment of the United States District Court for the Western District of Missouri in favor of the petitioner in the amount of \$44,976.22 on account of floor stocks taxes paid under the Agriculture Adjustment Act, which Act was held unconstitutional in *United States v. Butler*, 297 U. S. 1. The Congress provided recovery procedure in the Revenue Act of 1936, Title VII (49 Stat. 1648).

JURISDICTION.

The Judgment of the United States Circuit Court of Appeals for the Eighth Circuit reversing the judgment of the District Court in favor of petitioner was entered on June 30, 1942 (R. 74). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended (U. S. C. A. 28-347).

DECISION OF THE CIRCUIT COURT OF APPEALS.

The decision of the United States Circuit Court of Appeals for the Eighth Circuit, reversing the United States District Court for the Western District of Missouri will be found in the record on pages 67 to 74, inclusive, and is reported in 128 F. (2d) 992.

The opinion of the District Court will be found in the record on pages 47 to 54 inclusive, and is reported in 40 F. Supp. 787.

STATEMENT OF THE MATTER INVOLVED.

This action was commenced by suit in the United States District Court for the Western District of Missouri to recover floor stocks taxes paid to the United States by the petitioner under the Agriculture Adjustment Act of May 12, 1933, C. 25 (48 Stat. 31 and particularly Section 16 thereof, 7 U. S. C. A. par. 616), upon petitioner's August 1, 1933, inventory of cotton content merchandise held for sale on that date.

Petitioner contended that it had borne the burden of the tax and had not shifted the burden in any manner. Petitioner is engaged in the wholesale dry goods and general merchandise business, including the sale of cotton content merchandise.

The Government in its answer admitted that the tax had been paid and that claim for refund had been duly filed and rejected; it was denied that petitioner had borne the burden of the tax. The Government stated it did not have sufficient knowledge to form a belief as to the truth of the facts al-

leged by petitioner in its complaint showing that it had borne the burden of the tax.

The petitioner then moved for Summary Judgment in its favor under Rule 56, Federal Rules of Civil Procedure, upon the pleadings; supporting the Motion with affidavits based on knowledge and certified copies of records (R. 1 and 6 and 7 to 40 incl.).

The Government thereupon filed its own Motion for Summary Judgment (R. 46) with no supporting affidavits.

The trial Court, after a hearing, sustained petitioner's Motion for Summary Judgment and denied the Government's Motion, and judgment was entered for the petitioner.

The Trial Court's opinion showing its grounds for granting petitioner's Motion is reported at 40 F. Supp. 787 and in the record at 47 to 54, incl.

The Government appealed and the District Court was reversed with direction to dismiss.

The District Court made findings of fact with which the Appellate Court did not disagree, the only difference being in the conclusion of law as to whether the burden of the tax was borne by the petitioner.

The Circuit Court disregarded the proof showing the reasons for and the explanation of petitioner's price increase and held that (R. 73):

"The concrete definitely controlling consideration therefore is the established fact that the inventory valuations and the prices were raised coincident with the tax, and by the collection of the increased prices the tax was passed on."

The Circuit Court did not follow the law as established by the decisions of other Federal courts wherein it has been held repeatedly that if it is shown that *the price increases were based on factors other than the tax, the burden of the tax was not shifted.*

The Circuit Court also did not follow the law as established by the decisions of other Federal courts that where the inventory value of the merchandise has not been realized upon the sale of the merchandise after August 1, 1933, then the tax burden has not been shifted.

The opinion of the Circuit Court, if allowed to stand, will effectively prevent, at least in the Eighth Circuit, any refund of taxes where there has been a selling price increase because the Court's ruling establishes as a conclusive presumption that the tax burden was shifted when there is an admitted price increase, the Court holding (R. 72):

" * * * But where they (taxpayer) immediately *increased their prices* sufficient to cover the former prices of the articles, plus the amount of the tax, they *manifestly shifted the burden* to the customers." (Italics supplied.)

The opinion and the conclusion of law as decreed denies rebuttal and totally disregards the uncontradicted facts of record showing the reasons for the increase, namely:

1—Neither inventory, book, departmental, group or item cost of petitioner's merchandise was increased for the tax or any part of it;

2—Petitioner's department managers in charge of pricing never were instructed to, and they did not after August 1, 1933, increase or include in the prices asked any amount to cover this tax as a separate item, nor was it included in the price asked or received or attempted to be collected from the purchasers;

3—Petitioner's selling costs, salary and overhead expenses were increased by \$29,896.19 in the latter part of 1933 over a like period in 1932, and the bad debt charge-off in 1933 exceeded by \$58,166.58 the charge-off for the year 1932;

4—Petitioner, in 1933 in connection with the sale of the merchandise, advertised that its selling prices did not include the tax and that the tax burden would be absorbed and borne by the petitioner;

5—Petitioner's selling prices in June and July, 1933, were sub-normal due to necessity of raising cash to meet overdue bank loans; and the change in selling prices in August, 1933, was to reverse this subnormal

pricing and to price the merchandise on the regular pricing basis;

6—The market value of petitioner's inventory on July 30, 1933, the day preceding the tax date, was not realized on the sale of the merchandise subsequent to August 1, 1933.

7—The floor stocks tax never was a factor in determining the selling prices or the changes made after August 1, 1933.

The above facts were alleged in petitioner's complaint, established by the evidence (R. 7 to 40 incl.), stated as facts by the Trial Court in its opinion (R. 50, 51, 53 and 54) and repeated by the Circuit Court (R. 68, 69 and 71) in its statement of the case.

NEVERTHELESS, the Circuit Court held that the *single fact* that prices were increased was controlling, sufficient and conclusive that the tax burden was shifted by the petitioner and established a conclusive presumption against the petitioner.

The Court disregarded the explanation of the price increases as shown by the facts of record as above enumerated; that the floor stocks tax was never a factor in determining the selling price, that it was not intended by petitioner that the tax was to be passed on to the customer but it was to be borne by the petitioner and that the selling price change or increase was based on factors other than the tax and the tax was not included in the selling price or collected from the customer in any manner.

Therefore, the Eighth Circuit Court of Appeals, contrary to the applicable statutes (Section 902, 49 Stat. 1648—See appendix) and to the decisions of other Federal courts on an identical question, by this opinion has established as conclusive and un rebuttable a *presumption that an increase in selling prices at the incident of the floor stocks tax manifestly included the tax in the price and the collection of the selling price passed the tax on to the customer even though the price increase admittedly was caused by and based on factors other than the tax itself.*

QUESTION.

A.

The Selling Price of Cotton Merchandise Was Increased After the Floor Stocks Tax Became Effective. Did this Increase Raise an Unrebuttable Presumption that the Tax Burden Was Passed on?

1. The Government has defended floor stocks tax refund suits by so contending that an unrebuttable presumption is established.

2. The Circuit Court, in the instant case, agrees with Government's contention and answers the question in the affirmative.

3. Other Federal courts have held no presumption exists since it would result in giving to Section 902 (*supra*) an arbitrary and unreasonable effect and would render nugatory the act of Congress and the decision of this Court in *United States v. Butler* (*supra*).

B.

Does the Mere Increase of the Selling Price Subsequent to August 1, 1933, in Order to Recover the Market Value of the Cotton Goods Before the Tax Became Effective Operate to Shift the Burden of the Tax to the Customer?

1. The Circuit Court, in the instant case, holds that the taxpayer *manifestly* shifted the burden of the tax to the customer in the increased price (R. 72, 73).

2. *C. B. Cones & Sons Mfg. Co. v. United States* (C. C. A. 7th), 123 F. (2d) 530, under such circumstances, holds the burden was not shifted, (from the opinion) (p. 534):

" * * * we do not see how it can be logically contended that the plaintiff has obtained relief through the shifting of its burden merely by increasing its selling price so as to permit recovery of the actual market value of its product."

3. The Circuit Court, in the instant case, made this observation (from the opinion) (R. 73):

"The taxpayer has stressed the decision of the Seventh Circuit Court in *C. B. Cones & Sons Mfg. Co. v. United States*, 123 F. (2d) 530, as compelling a contrary conclusion, but the facts presented in that case are distinguishable and *it is not controlling here.*" (Italics supplied)

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

I.

At the present time there is a conflict between Circuit Courts of Appeal on the nature and extent of the burden of proof placed on the taxpayer by Section 902 (*supra*).

II.

The Circuit Court of Appeals for the Eighth Circuit in the instant case has decided a Federal question in a way in conflict with applicable decisions of other Federal courts.

III.

The Circuit Court of Appeals for the Eighth Circuit has decided an important question of Federal law which has not been but should be settled by this Court.

IV.

Title VII of the Revenue Act of 1936 is unconstitutional as construed by the Circuit Court of Appeals for the Eighth Circuit in the instant case, since failure to permit the recovery of the market value of the inventory on the day preceding the tax is an actual injury to the petitioner, as real as though he were being deprived of his property for less than its fair market value.

Reasons I and II.

There is a Conflict Between Federal Courts on an Important Federal Question.

The Eighth Circuit Court of Appeals, in the instant proceedings, as a conclusion of law decided that the petitioner had shifted the burden of the floor stocks tax because the petitioner increased its selling prices. The Court refuses to consider either argument or facts to rebut its conclusion; *the Court thus establishes a conclusive presumption.*

(From the Court's Opinion)

- (R. 73) "the *concrete definite controlling consideration* therefore is the established fact that the inventory valuation and the prices were raised coincident with the tax and by the collection of the increase price, the tax was passed on."
- (R. 72) "But where they immediately increased their prices sufficiently to cover the former prices of the articles plus the amount of the tax, *they manifestly shifted the burden* to the customer." (Italics supplied)

The Court's opinion disregards the admitted factors which actually caused the price changes, which factors were the motivating force behind and substantial reasons for and explained and justified the price advance. These undisputed facts clearly revealed that the price advances were caused by factors other than the tax. (See enumerated facts in the District Court's Opinion, R. 50, 51, 53 and 54, and in Circuit Court's statement of the case, R. 67, 68 and 69.)

The decision by the 8th Circuit Court is in direct conflict with the following decisions applying Section 902 (*infra*, appendix) and the taxpayer's burden of proof thereunder.

- (A) 7th Circuit Court of Appeals,
C. B. Cones & Sons Mfg. Co. v. United States
(*supra*).
- (B) District Court of Maryland,
Hutzler Bros. v. United States, 33 F. Supp. 801.
- (C) 4th Circuit Court of Appeals,

The *Hutzler Bros. case* (*supra*) arose within the jurisdiction of the 4th Circuit. However, the Government did not appeal. Nevertheless, the 4th Circuit Court in *Arkwright Mills v. Com.*, 127 F. (2d) 465, has quoted *C. B. Cones & Sons Mfg. Co.* (*supra*) with approval, which in turn quotes and follows the *Hutzler Bros. case* (*supra*).

(D) 3rd Circuit Court of Appeals,
Honorbilt Products v. Com., 119 F. (2d) 797.

While this case resulted in a decision that the tax burden was shifted, the facts were that the unfavorable margins were not rebutted, and there was also evidence of a price increase. The Court, at page 798 in its Opinion, stated there was

“* * * nothing in the record to show that the increase in price was due to any increase in the cost of raw materials, of labor, or of manufacture generally”.

Reason III.

The above (Reasons I and II) discloses that a serious conflict exists between the decision for which review is herein sought and those of other Federal courts, and it is urged the questions raised be settled by this Court.

The Government itself should welcome a final and authoritative pronouncement by this Court on these questions.

The many taxpayers who have (1) claims pending with the Bureau of Internal Revenue; (2) cases before the Processing Tax Board of Review, and (3) cases pending and those to be filed in various District courts and the Court of Claims will know, if this Court will settle these questions, whether to proceed further or to abandon their claims for refund of taxes under Title VII of the Revenue Act of 1936 (*supra*).

From the Opinion in *Anniston Mfg. Co. v. Davis*, 301 U. S. 337, it is apparent that the Supreme Court realized that in some later case they would be called upon to settle questions concerning the extent of the taxpayer's burden of proof under Section 902.

This instant case, with its decreed conclusive presumption and the existing conflict with decisions of other Federal courts, presents the ideal situation for such a final determination by this Court. *Thereafter*, the Government, the taxpayer claimants and all the Federal courts would have a positive rule of law for the application of the burden of proof under Section 902 in processing and floor stocks tax refund actions.

Reason IV.

The Circuit Court has denied to the petitioner the right to recover the market value of the cotton goods the day preceding the effective date of the tax.

The wholesale market value from April to July, 1933, of cotton goods had risen almost vertically by 100 per cent, and by the last of July, 1933, the petitioner had a large potential profit in its inventory over cost.

Petitioner's June and July, 1933, selling prices were subnormal and below the wholesale replacement cost. Its selling prices were increased in August, 1933, but not in sufficient amount to realize the wholesale market value of its inventory as of July 30, 1933.

In *C. B. Cones & Sons Mfg. Co. v. United States* (*supra*), the 7th Circuit permits the recovery of this market value through a price increase and holds that the tax burden was not shifted; thus, the Circuit Court's ruling in the instant case is in direct conflict therewith.

In *Arkwright Mills v. Comm.* (*supra*), the 4th Circuit quotes with approval the *Cones* case.

Wherefore, that the writ of Certiorari should be granted is respectfully submitted.

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